THE SAILOR AND THE LAW.

WHY AMERICAN BOYS DO NOT BECOME SAILORS.

SPEECH

OF

HON. JAMES G. MAGUIRE,

OF CALIFORNIA,

IN THE

HOUSE OF REPRESENTATIVES,

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Hon James G. Maguire,
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SPEECH

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The House being in Committee of the Whole on the state of the Union, and having under consideration the naval appropriation bill—

Mr. MAGUIRE said:

Mr. CHAIRMAN: The amendment which I have just proposed increases the annual salary of the instructor in practical seamanship at the Naval Academy from $397.50 to $500. It seems to me that this increase should be made. The position is one of importance and at least some responsibility, requiring a high degree of intelligence and considerable experience in the person who fills it.

Gentlemen say that his salary is already considerably higher than the wages paid able-bodied seamen in the merchant marine service. That, it seems to me, is no answer to my proposition. Sailors in the merchant marine service are not to be compared in efficiency with seamen in our Navy. Not more than 20 per cent of the sailors employed in American merchant ships are qualified to enlist in the United States Navy.

It requires a high type of man, both mentally and physically, to meet the requirements of enlistment in our Navy, and surely when an instructor in practical seamanship for our Naval Academy is selected from among the seamen in the naval service, he must be far above the average of able seamen in ability. Surely such a man is worth a salary of $500 a year.

WHY AMERICAN BOYS DO NOT BECOME SAILORS.

While on this subject, Mr. Chairman, I desire to impress upon this House the necessity for amending our maritime laws, not only in the interest of the American sailor but in the interest of the American Navy and of the Government. I have frequently, during the last five years, urged that the laws relating to the Government and treatment of American sailors be modernized and at least brought up to the standard of the maritime laws of other great nations. We are far behind most of the leading nations in this respect.

Our maritime code is a relic of the seventeenth century—perhaps it might be more fittingly assigned to an earlier century—and is utterly intolerable to the self-respecting and liberty-loving citizens of our country. As a result, the young men and boys of our country avoid the merchant marine service as an employment unfit for freemen. They are not averse to the sea; indeed, they are naturally disposed to court its perils and its trials. They do not hesitate to enlist in the United States Navy when opportunity offers.

The number of American boys eager to enlist in the Navy always exceeds the demand, and the number will ever increase in proportion to any possible increase in demand.

Why, then, do they so unanimously shrink from entering the merchant marine service? They have answered this question a thousand times. They have told us that the laws of our country place the American sailor too completely at the mercy of tyrannical and avaricious masters and owners of American merchant ships.

They have told us that under our laws a sailor's contract for personal service may be specifically enforced, no matter how intolerable the service may become to the sailor; that if he quits his employment in port, during the period of his contract, he may be "pursued from State to State," like a fugitive slave, arrested, and either condemned to prison like a criminal, as a penalty for violating his civil contract for personal service, or delivered over, in chains if need be, to his master, to complete the period of his articles in involuntary servitude. (See decision of the United States Supreme Court in the case of Robertson *vs.* Baldwin, which, under leave of the House, I will print in connection with my remarks.)

They tell us that the law affords an American sailor no protection against corporal punishment and other physical violence at the hands of captains and mates at sea, and gives him substantially no remedy for such wrongs and injuries afterwards, while the laws of other maritime nations give their sailors ample protection and redress under like circumstances.

They tell us that the laws do not require masters and owners of merchant vessels to furnish American sailors with sufficient nourishing and wholesome food, and that avaricious masters and owners frequently take advantage of this laxity of the law to make increased profits by failing to properly provision their ships; thus entailing privations, suffering, sickness, and deadly diseases upon an unduly great proportion of sailors.

They tell us that our laws fail to require sufficient forecastle room to be given to American sailors, thus imposing upon them hardships and discomforts, and causing an undue proportion of them to suffer from diseases of the respiratory organs.

They tell us that our laws fail to make sufficient provision for testing the seaworthiness of ships before American sailors are compelled to put to sea in them, and by that laxity, combined with the avarice of owners, causing unnecessary loss of life among sailors.

These and other defects in our maritime laws have, for generations, prevented the young men and boys of America from entering the merchant-marine service as seamen.

RELATION OF MERCHANT MARINE TO NAVY.

I have frequently called attention to the important relation which must ever subsist between the merchant-marine service of a country and its navy.

The merchant marine of this country should at all times have in its employ a great body of capable and experienced American sailors, from among whom, in any emergency, our Navy could draw any required force of able-bodied seamen, capable of passing the highest practical test of efficiency—health, strength, and intelligence. It is entirely the fault of past Congresses, and some-

what of the present Congress, that such a reserve force is not available now.

For five years, at least, bills that would have corrected these evils, that would have made seamanship an honorable and suitable employment for American boys, have been pending in Congress, receiving scant recognition in either House, and always failing in one.

The evil of this procrastination is now made apparent in the difficulty experienced in securing sailors who are up to the requisite naval standard of efficiency to man our auxiliary cruisers.

That our Regular Navy is fully and efficiently manned goes without the statement, and that our auxiliary cruisers will be well manned is equally certain, but the fact that there appears to be any lack of experienced sailors who are up to the naval standard of efficiency is a warning that should not pass unnoticed.

The Philadelphia Public Ledger a few days ago called attention to this situation in an editorial which deserves the patriotic attention of every member of Congress. It is as follows:

No less than sixty-three vessels belonging to the merchant marine, but capable of mounting an aggregate of 1,000 guns, were placed at the disposal of the Government for war purposes by their patriotic owners, in a single day, last Monday. The fact shows a universal patriotic spirit and it also shows that the shipmasters recognize the fact that war, if it comes, will be waged principally on the sea. Many of these vessels are of iron, and even the wooden ones would make a formidable addition to the Navy, but there is a serious drawback to their usefulness, which includes iron and wooden ships alike.

It is the lack of men to handle them. Already the Government finds itself obliged to relax the strictness of its regulations for enlisting men and to accept those of a class which it rejected only a few days ago. Last week it wanted only able and experienced seamen for enlistment on its war ships, but there were so few of this kind to be had that now it is taking inexperienced landsmen, with a view to training them in seamanship. The merchant vessels carry only enough men to handle them in ordinary course of business; they have none to spare for fighting purposes. We have no adequate school of naval seamen, and we see the need of one in emergencies like the present. Perhaps this will teach us to make such laws and arrangements as will preclude such a state of affairs in the future.

The Coast Seaman's Journal, of San Francisco, in the course of an able editorial on the same subject, says:

The trouble with the merchant-marine reserve is not so much that these vessels do not carry men enough for fighting purposes as that the men they do carry are inefficient. It is a matter of quality more than of quantity. * * *

A school of naval seamen is obviously out of the question as a means of training men to man the merchant-marine reserve in case of war. What is really required are laws which will make the merchant vessel a fit place for good seamen, a place that will cultivate, or at least give a chance of survival to the qualities that go to make good seamen in times of peace or war, instead of laws which degrade them, as at present. In other words, we require a little patriotism in the management of the seamen who man the merchant fleet as well as in the management of the fleet itself. In the accomplishment of this purpose the Public Ledger may do good service by advocating the enactment of the laws now pending in Congress for the improvement of the American seamen's lot.

The importance of improving the personnel of the merchant marine as a reserve for the navy is fully recognized by English statesmen, who for over twenty years have been legislating for the improvement of the condition, care, and treatment of sailors in that service.

Mr. Goschen, first lord of the Admiralty, in presenting the naval estimates to the House of Commons a short time ago, is reported by the press as follows:

Mr. Goschen then deplored the recent industrial struggles, and appealed for an increase of pay for the British seamen of the merchant marine, saying

that, if from false economy or impossible conditions on either side, British sailors and ships were ousted by foreigners, then "God help us." He concluded: "If peace shall again reign in our centers of industry and maritime interests, and if the nation that calls herself mistress of the sea reasserts herself by an increase of merchant seamen, then the nation may look forward in confidence that if there be peace it will be peace with honor, but if war, which God forbid, it must be war crowned with victory."

'The difficulties now being experienced in recruiting seamen for our auxiliary cruisers is not, I apprehend, a difficulty in securing sailors, but in securing sailors who are citizens of the United States, who are within the age limits, and who come up to the physical standard established for the naval service.

This is not strange. Owing to the conditions that prevent American boys from entering the merchant-marine service, more than 50 per cent of the sailors employed in that service are citizens of other countries, and of the other 50 per cent, one-half are physically incapable of enlisting.

EFFECTS OF UNSANITARY CONDITIONS AND BAD FOOD.

The following extracts from the reports of the Surgeon-General of the Marine-Hospital Service for the years 1888, 1893, and 1894 give a very good idea of the fearful effects produced by improper food and insufficient forecastle accommodations upon the health of sailors employed in the American merchant-marine service. I read from pages 126 and 127 of the report for 1888:

But notwithstanding this favorable testimony from such reliable sources, it is believed that the food or lime-juice regulation is strictly observed on but few, if any, merchant vessels arriving here; and the only rational explanation for the apparent contradictions is that the facts relating to the treatment of sailors are to a great degree concealed, probably in the majority of cases, by a lawless and inhuman horde of vagabonds that swarm around vessels before they drop anchor even, and who take charge of the sailors as if they were animals, drug and debauch them in low boarding houses, and in case they offer any remonstrance the punishment is cruel treatment on the spot.

It is generally understood also that these outrages are frequently committed with the knowledge if not the consent of the officers of the ship. This view is confirmed by seamen and others interested in maritime affairs. It is also asserted that in many instances the question of diet is agreed upon between the master and crew after the ship sails from port, without regard to the scale inserted in the articles of agreement, the men in most cases accepting the ration offered and provided at the discretion of the commander in place of the governmental allowance.

It is quite evident from the foregoing that to guard against an inferior quality and quantity of supplies an inspection of the stores should invariably be made before any deep-water ship is allowed to clear. Moreover, if it was understood that surveys would always be held at the port of destination on any portion of the provisions, and investigations made regarding the issue of food and lime juice whenever proper cause is shown therefor; and penalties inflicted should the charges be proved, it would undoubtedly secure a more strict compliance with the laws promulgated for the guidance of mariners and increase the efficiency of sailors correspondingly.

Among the dietetic diseases treated at this hospital scurvy forms the most interesting and instructive part, and this report would be incomplete without mentioning the subject here. This is a disease of malnutrition, and without dwelling upon the ætiology, pathology, treatment, or history of the malady, it is sufficient to say that all authorities agree that it is caused, for the most part, by long-continued deprivation of certain nutritive principles contained in fresh vegetable food. Among the contributing or additional causes may be noted in general terms various disabilities contracted prior to shipment; extremes of heat and cold; the habit of many eating sea bread soaked in "slush," or grease; long-continued service at sea; overwork; damp and filthy quarters; individual uncleanliness, etc. It was known to the father of medicine, and has prevailed more or less extensively from time immemorial.

One of the most notable epidemics on land broke out during the potato famine in Ireland in 1847, and in the early months of the Crimean war the

French lost more men from scurvy than from bullets. During the last war in this country—1861-1864—out of 807,000 cases there were 47,000 of scurvy with a death rate of 16 per cent. On account of shipwreck and other disasters incident to navigation, it has always been a special foe to seamen, owing to the impossibility to procuring frequent supplies of fresh food and water; but under ordinary circumstances in modern times, with steam largely utilized in place of sail, there is but little excuse for the appearance of such a scourge.

Indeed, it has been said, justly, that when "a sailor dies of scurvy, someone must be as responsible as if the fatal event were due to poisoning." The record of the disease at this hospital is therefore of special value in this connection. During the past seventeen years 9,951 sick and disabled seamen were admitted, including both American and foreign sailors, and out of this number 391 suffered from scurvy and 12 died. The subjoined table, compiled in chronological order, gives the number of cases treated each year, together with the nationality of the vessels from whence they were admitted, viz:

Year.	American vessels.	British vessels.	German vessels.	French vessels.	Italian vessels.	Russian vessels.	Japanese vessels.	Norwegian vessels.	Belgian vessels.	Total.	Remarks.
1872	18	5	----	13	----	----	----	----	5	41	
1873 *a*	32	----	----	----	----	----	----	----	----	32	1 death, American.
1874 *a*	29	----	----	----	----	----	----	----	----	29	Do.
1875 *a*	12	----	----	----	----	----	----	----	----	12	
1876	28	43	5	----	1	----	----	----	----	77	2 deaths, 1 Italian, 1 British.
1877	15	9	----	----	----	----	----	----	----	24	1 death, American.
1878	12	3	----	----	----	----	4	----	----	19	1 death, British.
1879	13	2	----	----	----	----	----	----	----	15	
1880	8	1	----	----	----	----	----	----	----	9	
1881	23	4	7	----	----	----	----	----	----	34	3 deaths—2 Americans, 1 German.
1882	5	18	8	----	----	1	----	----	----	32	1 death, British.
1883	7	5	2	----	----	----	----	----	----	14	
1884	13	1	----	----	----	----	----	----	----	14	2 deaths, American.
1885	7	4	----	----	7	----	----	----	----	18	
1886	6	2	----	----	----	----	----	1	----	9	
1887	3	1	2	----	----	----	----	----	----	6	
1888	4	2	----	----	----	----	----	----	----	6	
Total	235	100	24	13	8	1	4	1	5	391	

a Foreign seamen not treated at marine hospital during the years 1873, 1874, and 1875.

I now read the following table made up from the report for 1893:

	North Atlantic.	Middle Atlantic.	South Atlantic.	Gulf.	Ohio.	Mississippi.	Great Lakes.	Pacific.
Scurvy and beriberi	3	2	2	2	----	----	----	29
Rheumatism	520	567	829	369	404	239	1,036	312
Tubercle	110	127	111	33	126	68	183	134
Sickness of respiratory	504	631	794	382	440	289	1,278	461
Digestive	656	684	1,245	740	686	502	1,343	544
Injuries	647	617	696	476	355	408	1,146	827
Total treated	5,606	6,218	8,863	5,213	5,219	4,376	12,020	5,604

Also the following, compiled from the report for 1894:

	North Atlantic.	Middle Atlantic.	South Atlantic.	Gulf.	Ohio.	Mississippi.	Great Lakes.	Pacific.
Scurvy and beriberi	5	2	3	3	2	------	------	16
Rheumatism	635	676	636	514	338	370	1,072	309
Tubercle	126	129	144	67	100	58	177	122
Respiratory	601	775	682	416	323	284	1,115	475
Digestive	741	755	1,049	713	721	732	1,363	584
Injuries	730	616	575	543	333	410	1,084	755
Total treated	6,322	6,813	8,426	5,283	4,576	4,310	11,551	5,412

Further comment on this phase of the question is unnecessary.

DESERTIONS IN FOREIGN PORTS.

It is assumed by gentlemen who oppose these reforms that if sailors were allowed to leave their ships in foreign ports that right would be ruinous to the merchant-marine interests engaged in foreign commerce. Nothing could be farther from the truth.

Prior to 1884 the articles of a sailor could not be canceled by the mutual consent of the sailor and the master of an American merchant vessel in a foreign port. The theory upon which this inhibition rested was that in a foreign port an American vessel could not get a new crew if her articled crew should either desert or be discharged; that an American ship losing her crew in a foreign port must "rot in her neglected brine." Both seamen and masters have for many years known that there is absolutely no truth in the theory and have acted on that knowledge.

For fifty years an American vessel has had no more trouble in securing a crew in any foreign port than have the vessels of the country to which the port belongs—no more trouble than she would have in securing a crew in an American port.

The owners and masters of American vessels, required by the exigencies of trade to lie for a considerable time in a foreign port awaiting cargo, generally got rid of the expense and annoyance of keeping their crews in idleness by compelling them to desert; enlisting new crews when cargoes were ready. This practice became well-nigh universal long before the passage of the Dingley maritime bill of 1884, which sought to correct the evil by making it lawful for masters and sailors to cancel such articles by agreement in foreign ports.

Nominally this act gives equal rights in this matter to masters and sailors, but in fact it does not. The practical effect is to authorize the master to discharge his crew whenever and in whatever port it may please him to do so, but gives no corresponding right to the sailor. The discharge must be by agreement. Neither party has a legal right to annul the contract; but the master is manifestly in a position to enforce his will if he wishes the articles canceled, while the sailor has no such power to enforce his will. The sailor can, of course, desert if he is willing to accept the legal penalties and other consequences, but he could have done that before the passage of the Dingley Act.

The master, however, can enforce a cancellation of the agreement when it is to his interest, or to the interest of his employers to have it canceled, by making life on the ship intolerable to the sailors who will not agree to be discharged. This the masters very generally did before the passage of the Dingley Act.

Before the passage of that act nearly all American sailors were forced to desert in foreign ports whenever their ships were considerably delayed in such ports. Since the passage of the act nearly all American sailors are, under like circumstances, voluntarily discharged in such ports by the masters, as the following comparative statement of the "number of seamen discharged, deserted, and shipped by the consuls, in the ports of Liverpool, Hamburg, and Singapore, in 1883 and in 1893," certified by Mr. S. Wike, acting Secretary of the Treasury, to the Committee on Merchant Marine and Fisheries of the Fifty-third Congress, on May 18, 1894, will show:

Consulates.	1883.			1893.		
	Discharged.	Deserted.	Shipped.	Discharged.	Deserted.	Shipped.
Hamburg	20	107	109	14	None.	None.
Liverpool	424	*1,114	1,614	958	15	995
Singapore	17	10	44	70	None.	65

*Inclusive of three quarters only. The report of desertions for the fourth quarter not found.

The years taken for the purpose of this comparison were 1883, one year before the passage of the Dingley bill, and 1893, nine years after its passage. They are representative years of the two periods, and the ports selected are fairly representative of the foreign ports of the world.

This table, in connection with what I have said of the absolute control of the matter of discharges held by the masters of vessels, clearly establishes my contention that no hardship to masters or owners of merchant vessels is involved in permitting seamen at will, subject to such civil damages as may be provided for, to terminate their shipping contracts in foreign ports.

All ships of all nations stand upon an equal footing with respect to the shipment of crews in all seaports of the world. The sailor is in the matter of his private employment, a citizen of the world. The ease or difficulty with which a crew may be secured for a ship depends, not upon her nationality, but upon her reputation and the reputation of her flag for the treatment of sailors.

THIRTEENTH AMENDMENT DOES NOT PROTECT SAILORS.

In the course of my remarks I referred to the decision of the United States Supreme Court in the case of Robertson and others *vs.* Baldwin, stating that it so limits the meaning and effect of the thirteenth amendment to the Federal Constitution as to exclude articled sailors from the protection of its provision against involuntary servitude.

Indeed, the limitation put upon the thirteenth amendment by that decision makes contractual slavery, such as prevails between so-called employers and employees, but really between masters and slaves, on the Hawaiian Islands, perfectly legitimate and enforceable in the United States. It restores subdivision 3 of section

2 of Article IV of the Constitution of the United States, which provides:

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

But the decision needs neither explanation nor comment. Its terms are unmistakable as its effect is far-reaching.

Under the leave granted me by the House, I will print it, together with the dissenting opinion of Justice Harlan and the petition for rehearing presented by Mr. Jackson H. Ralston and myself. The opinion of the court is as follows:

DECISION IN ROBINSON'S CASE.

[Supreme Court of the United States. No. 334.—October term, 1896. Robert Robertson et al., appellants, *vs.* Barry Baldwin. Appeal from the district court for the northern district of California. January 25, 1897.]

This was an appeal from a judgment of the district court for the northern district of California, rendered August 5, 1895, dismissing a writ of habeas corpus issued upon the petition of Robert Robertson, P. H. Olsen, John Bradley, and Morris Hanson.

The petition set forth, in substance, that the petitioners were unlawfully restrained of their liberty by Barry Baldwin, marshal for the northern district of California, in the county jail of Alameda County, by virtue of an order of commitment made by a United States commissioner, committing them for trial upon a charge of disobedience of the lawful orders of the master of the American barkentine *Arago;* that such commitment was made without reasonable or probable cause, in this: That at the time of the commission of the alleged offense petitioners were held on board the *Arago* against their will and by force, having been theretofore placed on board said vessel by the marshal for the district of Oregon, under the provisions of Revised Statutes, section 4596, subdivision 1, and sections 4598 and 4599, the master claiming the right to hold petitioners by virtue of these acts; that sections 4598 and 4599 are unconstitutional and in violation of section 1 of Article III, and of the fifth amendment to the Constitution; that section 4598 was also repealed by Congress on June 7, 1872 (17 Stat., 262), and that the first subdivision of section 4596 is in violation of the thirteenth amendment, in that it compels involuntary servitude.

The record was somewhat meager, but it sufficiently appeared that the petitioners had shipped on board the *Arago* at San Francisco for a voyage to Knappton, in the State of Washington; thence to Valparaiso; and thence to such other foreign ports as the master might direct, and return to a port of discharge in the United States; that they had each signed shipping articles to perform the duties of seamen during the course of the voyage; but, becoming dissatisfied with their employment, they left the vessel at Astoria, in the State of Oregon, and were subsequently arrested under the provisions of Revised Statutes, sections 4596 to 4599, taken before a justice of the peace, and by him committed to jail until the *Arago* was ready for sea (some sixteen days), when they were taken from the jail by the marshal and placed on board the *Arago* against their will; that they refused to "turn to" in obedience to the orders of the master, were arrested at San Francisco, charged with refusing to work in violation of Revised Statutes, section 4596; were subsequently examined before a commissioner of the circuit court, and by him held to answer such charge before the district court for the northern district of California.

Shortly thereafter they sued out this writ of habeas corpus, which, upon a hearing before the district court, was dismissed and an order made remanding the prisoners to the custody of the marshal.

Whereupon petitioners appealed to this court.

Mr. Justice Brown delivered the opinion of the court.

Upon what ground the court below dismissed the writ and remanded the petitioners does not appear, but the record raises two questions of some importance. First, as to the constitutionality of Revised Statutes, sections 4598 and 4599, in so far as they confer jurisdiction upon justices of the peace to apprehend deserting seamen and return them to their vessel; second, as to the conflict of the same sections and also section 4596 with the thirteenth amendment to the Constitution, abolishing slavery and involuntary servitude.

Section 4598, which was taken from section 7 of the act of July 20, 1790, reads as follows:

"SEC. 4598. If any seaman who shall have signed a contract to perform a voyage shall, at any port or place, desert, or shall absent himself from such

vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of the peace within the United States, upon the complaint of the master, to issue his warrant to apprehend such deserter, and bring him before such justice; and if it then appears that he has signed a contract within the intent and meaning of this title, and that the voyage agreed for is not finished, or altered, or the contract otherwise dissolved, and that such seaman has deserted the vessel, or absented himself without leave, the justice shall commit him to the house of correction or common jail of the city, town, or place, to remain there until the vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman."

Section 4599, which was taken from section 53 of the shipping commissioners' act of June 7, 1872, authorizes the apprehension of deserting seamen, with or without the assistance of the local public officers or constables, and without a warrant, and their conveyance before any court of justice or magistrate of the State to be dealt with according to law.

Section 4596, which is also taken from the same act, provides punishment by imprisonment for desertion, refusal to join the vessel, or absence without leave.

1. The first proposition, that Congress has no authority under the Constitution to vest judicial power in the courts of judicial officers of the several States, originated in an observation of Mr. Justice Story in Martin *vs.* Hunter's Lessees (1 Wheat., 304, 330), to the effect that "Congress can not vest any portion of the judicial power of the United States, except in courts ordained and established by itself." This was repeated in Houston *vs.* Moore (5 Wheat., 1, 27); and the same general doctrine has received the approval of the courts of the several States. (United States *vs.* Lathrop, 17 Johns., 4; Ely *vs.* Peck, 7 Connecticut, 239; United States *vs.* Campbell. 6 Hall's Law Jour., 113, Ohio Com. Pleas.)

These were all actions for penalties, however, wherein the courts held to the familiar doctrine that the courts of one sovereignty will not enforce the penal laws of another. (Huntington *vs.* Attrill, 146 U. S., 657, 672.) In Commonwealth *vs.* Feely (1 Va. Cases, 325), it was held by the general court of Virginia in 1813 that the State courts could not take jurisdiction of an indictment for a crime committed against an act of Congress.

In Ex parte Knowles (5 California, 300) it was held that Congress had no power to confer jurisdiction upon the courts of a State to naturalize aliens, although, if such power be recognized by the legislature of a State, it may be exercised by the courts of such State of competent jurisdiction.

In State *vs.* Rutter (12 Niles' Register, 115, 231) it was held, in 1817, by Judges Bland and Hanson, of Maryland, that Congress had no power to authorize justices of the peace to issue warrants for the apprehension of offenders against the laws of the United States. A directly contrary view, however, was taken by Judge Cheves, of South Carolina, in Ex parte Rhodes (12 Niles' Register, 264).

The general principle announced by these cases is derived from the third article of the Constitution, the first section of which declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," the judges of which courts "shall hold their offices during good behavior," etc., and by the second section, "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens, or subjects."

The better opinion is that the second section was intended as a constitutional definition of the judicial power (Chisholm *vs.* Georgia, 2 Dall., 419, 475), which the Constitution intended to confine to courts created by Congress; in other words, that such power extends only to the trial and determination of "cases" in courts of record, and that Congress is still at liberty to authorize the judicial officers of the several States to exercise such power as is ordinarily given to officers of courts not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself.

This was the view taken by the supreme court of Alabama in Ex parte Gist (26 Alabama, 156), wherein the authority of justices of the peace and other such officers to arrest and commit for a violation of the criminal law of the

United States was held to be no part of the judicial power within the third article of the Constitution. And in the case of Prigg *vs.* Pennsylvania (16 Pet., 539) it was said that, as to the authority conferred on State magistrates to arrest fugitive slaves and deliver them to their owners, under the act of February 12, 1793, while a difference of opinion existed, and might still exist upon this point in different States, whether State magistrates were bound to act under it, no doubt was entertained by this court that State magistrates might, if they chose, exercise the authority, unless prohibited by State legislation. See also Moore *vs.* Illinois (14 How., 13); In re Kaine (14 How., 103).

We think the power of justices of the peace to arrest deserting seamen and deliver them on board their vessel is not within the definition of the "judicial power" as defined by the Constitution, and may be lawfully conferred upon State officers. That the authority is a most convenient one to intrust to such officers can not be denied, as seamen frequently leave their vessels in small places, where there are no Federal judicial officers, and where a justice of the peace may usually be found, with authority to issue warrants under the State laws.

2. The question whether sections 4598 and 4599 conflict with the thirteenth amendment, forbidding slavery and involuntary servitude, depends upon the construction to be given to the term "involuntary servitude." Does the epithet "involuntary" attach to the word "servitude" continuously, and make illegal any service which becomes involuntary at any time during its existence, or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into? If the former be the true construction, then no one, not even a soldier, sailor, or apprentice, can surrender his liberty, even for a day; and the soldier may desert his regiment upon the eve of battle or the sailor at an intermediate port or landing, or even in a storm at sea, provided only he can find means of escaping to another vessel.

If the latter, then an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract, not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed involuntary. Thus if one should agree, for a yearly wage, to serve another in a particular capacity during his life and never to leave his estate without his consent, the contract might not be enforceable for the want of a legal remedy, or might be void upon grounds of public policy, but the servitude could not be properly termed involuntary.

Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 17, 1823 (4 Geo. IV, chapter 34, section 3), it was enacted that if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, laborer, or other person should contract to serve another for a definite time, and should desert such service during the term of the contract, he was made liable to a criminal punishment. The breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and possibly some others, nor would public opinion tolerate a statute to that effect.

But we are also of opinion that, even if the contract of a seaman could be considered within the letter of the thirteenth amendment, it is not, within its spirit, a case of involuntary servitude. The law is perfectly well settled that the first ten commandments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.

Thus, the freedom of speech and of the press (Article I) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (Article II) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (Article V) does not prevent a second trial if upon the first trial the jury fail to agree, or if the verdict was set aside upon the defendant's motion (United States *vs.* Ball, 163 U. S., 662, 672); nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment. (Brown *vs.* Walker, 161 U. S., 591, and cases cited.) Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial.

The prohibition of slavery in the thirteenth amendment is well known to have been adopted with reference to a state of affairs which had existed in certain States of the Union since the foundation of the Government, while the addition of the words "involuntary servitude" were said in the Slaughterhouse Cases (16 Wall., 36) to have been intended to cover the system of Mexican peonage and the Chinese cooly trade, the practical operation of which might have been a revival of the institution of slavery, under a different and less offensive name.

It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, Where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.

From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty beyond the ordinary civil remedies upon contract that the sailor will not desert the ship at a critical moment or leave her at some place where seamen are impossible to be obtained—as Molloy forcibly expresses it, "to rot in her neglected brine." Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself.

Hence the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion or absence without leave during the life of the shipping articles.

Even by the maritime law of the ancient Rhodians, which is supposed to antedate the birth of Christ by about nine hundred years, according to Pardessus (Lois Maritimes, volume 1, page 250), if the master or the sailors absented themselves by night, and the vessel were lost or damaged, they were bound to respond in the amount of the loss.

In the compilation of maritime laws known as the Consulate of the Sea it was also provided that a sailor should not go ashore without permission, upon the penalty of being obliged to pay any damage occasioned by his absence, and, in default of his being able to respond, of being thrust in prison until he had paid all such damage. (Chapters 121, 124; 2 Pardessus, 146, 147.)

A like provision is found in the Rules of Oleron, promulgated in the reign of Henry III, by which, Article V, the seamen were forbidden to leave the ship without the master's consent. "If they do and by that means she happens to be lost or damnified, they shall be answerable for the damage." (1 Pet. Ad., xi.) A similar prohibition is found in article 17 of the laws of Wisbuy. (1 Pet. Ad., lxxiii.)

The laws of the towns belonging to the Hanseatic League, first enacted and promulgated in 1597, were still more explicit and severe. No seaman might go ashore without the consent of the master, or other officer, and, if he remained longer than the time allowed, was condemned to pay a fine or suffer an imprisonment (articles 22 and 23); and by article 40, if a seaman went ashore without leave and the ship happened to receive any damage, "he shall be kept in prison upon bread and water for one year," and if any seaman died or perished for the want of the assistance of the absent seaman, the latter was subject to corporal punishment; and by article 43, "if an officer or seaman quits a ship and conceals himself, if afterwards he is apprehended, he shall be delivered up to justice to be punished; he shall be stigmatized in the face with the first letter of the name of the town to which he belongs." (5 Pet. Ad. cii.)

By the marine ordinance of Louis XIV, which was in existence at the time the Constitution was adopted (Title Third, Article III), "if a seaman leaves a master without a discharge in writing before the voyage is begun, he may be taken up and imprisoned wherever he can be found, and compelled to restore what he has received, and serve out the time for which he had engaged himself for nothing; and if he leaves the ship after the voyage is begun, he may be punished corporally." Article V: "After the ship is laded, the seamen shall not go ashore without leave from the master, under pain of 5 livres for the first fault, and may be punished corporally if they commit a second."

The present commercial code of France, however, makes no express provision upon the subject, but by the general mercantile law of Germany, article 532, "the master can cause any seaman who, after having been en-

gaged, neglects to enter upon or continue to do his duties to be forcibly compelled to perform the same."

By the Dutch code, article 402, "the master, or his representative, can call in the public force against those who refuse to come on board, who absent themselves from the ship without leave, and refuse to perform to the end of the service for which they were engaged."

Nearly all of the ancient commercial codes either make provision for payment of damages by seamen who absent themselves from their ships without leave, or for their imprisonment, or forcible conveyance on board. Some of the modern commercial codes of Europe and South America make similar provisions. (Argentine Code, article 1154.) Others, including the French and Spanish codes, are silent upon the subject.

Turning now to the country from which we have inherited most immediately our maritime laws and customs, we find that Malynes, the earliest English writer upon the Law Merchant, who wrote in 1622, says in his Lex Mercatoria (Volume I, chapter 23) that "mariners in a strange port should not leave the ship without the master's license, or fastening her with four ropes, or else the loss falls upon them. * * *

"In a strange country, the one-half of the company, at least, ought to remain on shipboard, and the rest who go on land should keep sobriety and abstain from suspected places, or else should be punished in body and purse; like as he who absents himself when the ship is ready to sail. Yea, if he gives out himself worthier than he is in his calling, he shall lose his hire; half to the admiral, and the other half to the master." Molloy, one of the most satisfactory of early English writers upon the subject, states that if seamen depart from a ship without leave or license of the master, and any disaster happens, they must answer, quoting Article V of the Rules of Oleron in support of his proposition.

There appears to have been no legislation directly upon the subject until 1729, when the act of 2 George II, chapter 36, was enacted "for the better regulation and government of seamen in the merchants' service." This act not only provided for the forfeiture of wages in case of desertion, but for the apprehension of seamen deserting or absenting themselves, upon warrants to be issued by justices of the peace, and, in case of their refusal to proceed upon the voyage, for their committal to the house of correction at hard labor. Indeed, this seems to have furnished a model upon which the act of Congress of July 20, 1790 (1 Stat., 131), for the government and regulation of seamen in the merchants' service, was constructed. The provisions of this act were substantially repeated by the act of 1791 (31 George III, chapter 39), and were subsequently added to and amended by acts of 5 and 6 William IV, chapter 19, and 7 and 8 Victoria, chapter 112).

The modern law of England is full and explicit upon the duties and responsibilities of seamen. By the merchants' shipping act of 1854 (17 and 18 Vict., chapter 104), section 243, a seaman guilty of desertion might be summarily punished by imprisonment, by forfeiture of his clothes and effects, and all or any part of his wages. Similar punishment was meted out to him for neglecting or refusing to join his ship, or to proceed to sea, or for absence without leave at any time. By section 246, "whenever, at the commencement or during the progress of any voyage, any seaman or apprentice neglects or refuses to join, or deserts from or refuses to proceed to sea in any ship in which he is duly engaged to serve," the master was authorized to call upon the police officers or constables to apprehend him without warrant and take him before a magistrate, who, by article 247, was authorized to order him to be conveyed on board for the purpose of proceeding on the voyage.

The provision for imprisonment for desertion seems to have been repealed by the merchants' seamen (payment of wages and rating) act of 1880; but the tenth section of that act retained the provision authorizing the master to call upon the police officers or constables to convey deserting seamen on board their vessels.

This act, however, appears to have been found too lenient, since, in 1894, the whole subject was reconsidered and covered in the new merchants' shipping act (57 and 58 Vict., chapter 60) of 748 sections, section 221 of which provides not only for the forfeiture of wages in case of desertion, but for imprisonment with or without hard labor, except in cases arising in the United Kingdom. The provision for the arrest of the deserting seaman and his conveyance on board the ship is, however, retained both within and without the Kingdom. (Sections 222, 223.) This is believed to be the latest legislation on the subject in England.

The earliest American legislation which we have been able to find is an act of the colonial general court of Massachusetts, passed about 1668, wherein it was enacted that any mariner who departs and leaves a voyage upon which he has entered shall forfeit all his wages and shall be further punished by imprisonment or otherwise, as the case may be circumstanced; and if he shall have received any considerable part of his wages, and shall run away,

he shall be pursued as a disobedient runaway servant. (Mass. Col. Laws, ed. 1889, 251, 256.)

The provision of Revised Statutes, section 4598, under which these proceedings were taken, was first enacted by Congress in 1790. (1 Stat., 131, section 7.) This act provided for the apprehension of deserters and their delivery on board the vessel, but apparently made no provision for imprisonment as a punishment for desertion; but by the shipping commissioners' act of 1872 (17 Stat., 243, section 51), now incorporated into the Revised Statutes as section 4596, the court is authorized to add to forfeiture of wages for desertion imprisonment for a period of not more than three months, and for absence without leave imprisonment for not more than one month. In this act and the amendments thereto very careful provisions are made for the protection of seamen against the frauds and cruelty of masters, the devices of boarding-house keepers, and, as far as possible, against the consequences of their own ignorance and improvidence.

At the same time discipline is more stringently enforced by additional punishments for desertion, absence without leave, disobedience, insubordination, and barratry. Indeed, seamen are treated by Congress, as well as by the Parliament of Great Britain, as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense which minors and wards are entitled to the protection of their parents and guardians:—"Quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares." The ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly.

In the face of this legislation upon the subject of desertion and absence without leave, which was in force in this country for more than sixty years before the thirteenth amendment was adopted, and similar legislation abroad from time immemorial, it can not be open to doubt that the provision against involuntary servitude was never intended to apply to their contracts.

The judgment of the court below is, therefore,

Affirmed.

Mr. Justice Gray was not present at the argument, and took no part in the decision of this case.

DISSENTING OPINION.

Mr. Justice Harlan, dissenting:

The appellants shipped on the American barkentine *Arago*, having previously signed articles whereby they undertook to perform the duties of seamen during a voyage of that vessel from San Francisco (quoting from the record) "to Knappton, State of Washington, and thence to Valparaiso, and thence to such other foreign ports as the master may direct, and return to a port of discharge in the United States." The vessel was engaged in a purely private business.

As stated in the opinion of the court, the appellants left the vessel at Astoria, Oreg., without the consent of the master, having become dissatisfied with their employment. The grounds of such dissatisfaction are not stated.

Upon the application of the master, a justice of the peace at Astoria, Oreg., proceeding under sections 4596 to 4599 of the Revised Statutes of the United States, issued a warrant for the arrest of the appellants. They were seized, somewhat as runaway slaves were in the days of slavery, and committed to jail without bail "until the *Arago* was ready for sea." After remaining in jail for some sixteen days they were taken by the marshal and placed on board the *Arago* against their will. While on board they refused to "turn to" or to work in obedience to the orders of the master. Upon the arrival of the barkentine at San Francisco they were arrested for having refused to work on the vessel, and committed for trial upon that charge.

If the placing of the appellants on board the *Arago* at Astoria against their will was illegal, then their refusal to work while thus forcibly held on the vessel could not be a criminal offense, and their detention and subsequent arrest for refusing to work while the vessel was going from Astoria to San Francisco were without authority of law. The question therefore is whether the appellants, having left the vessel at Astoria, no matter for what cause, could lawfully be required against their will to return to it, and to render personal services for the master.

The Government justifies the proceedings taken against the appellants at Astoria by sections 4596, 4598, and 4599 of the Revised Statutes of the United States.

By section 4596 it is provided:

"SEC. 4596. Whenever any seaman who has been lawfully engaged, or any apprentice to the sea service, commits any of the following offenses, he shall be punishable as follows: First. For desertion, by imprisonment for not more than three months, and by forfeiture of all or any part of the clothes or effects

he leaves on board, and of all or any part of the wages or emoluments which he has then earned.

"Second. For neglecting and refusing, without reasonable cause, to join his vessel, or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel sailing from any port, either at the commencement or during the progress of any voyage; or for absence at any time without leave and without sufficient reason from his vessel or from his duty not amounting to desertion, or not treated as such by the master, by imprisonment for not more than one month and also, at the discretion of the court, by forfeiture of his wages, of not more than two days' pay, and for every twenty-four hours of absence either a sum not exceeding six days' pay or any expenses which have been properly incurred in hiring a substitute.

"Third. For quitting the vessel without leave after her arrival at her port of delivery and before she is placed in security, by forfeiture out of his wages of not more than one month's pay.

"Fourth. For willful disobedience to any lawful command, by imprisonment for not more than two months, and also, at the discretion of the court, by forfeiture out of his wages of not more than four days' pay.

"Fifth. For continued willful disobedience to lawful commands, or continued willful neglect of duty, by imprisonment for not more than six months, and also, at the discretion of the court, by forfeiture, for every twenty-four hours' continuance of such disobedience or neglect, of either a sum not more than twelve days' pay, or sufficient to defray any expenses which have been properly incurred in hiring a substitute.

"Sixth. For assaulting any master or mate, by imprisonment for not more than two years.

"Seventh. For combining with any other of the crew to disobey lawful commands, or to neglect duty, or to impede navigation of the vessel, or the progress of the voyage, by imprisonment for not more than twelve months. * * *"

These provisions are brought forward from the act of June 7, 1872, chapter 322, section 51. (17 Stat., 273.)

Section 4598 provides: "SEC. 4598. If any seaman who shall have signed a contract to perform a voyage shall, at any port or place, desert, or shall absent himself from such vessel without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of the peace within the United States, upon the complaint of the master, to issue his warrant to apprehend such deserter, and bring him before such justice; and if it then appears that he has signed a contract within the intent and meaning of this title, and that the voyage agreed for is not finished, or altered, or the contract otherwise dissolved, and that such seaman has deserted the vessel, or absented himself without leave, the justice shall commit him to the house of correction or common jail of the city, town, or place, to remain there until the vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman."

This section is the same as section 7 of the act of July 20, 1890, chapter 29, 1 Statutes at Large, page 134.

By section 4599—which is substantially the same as section 53 of the above act of June 7, 1872—it is provided: "SEC. 4599. Whenever, either at the commencement of or during any voyage, any seaman or apprentice neglects or refuses to join, or deserts from or refuses to proceed to sea in, any vessel in which he is duly engaged to serve, or is found otherwise absenting himself therefrom without leave, the master or any mate, or the owner or consignee, or shipping commissioner, may, in any place in the United States, with or without the assistance of the local public officers or constables, who are hereby directed to give their assistance if required, and also at any place out of the United States, if and so far as the laws in force at such place will permit, apprehend him without first procuring a warrant; and may thereupon, in any case, and shall in case he so requires and it is practicable, convey him before any court of justice or magistrate of any State, city, town, or county, within the United States, authorized to take cognizance of offenses of like degree and kind, to be dealt with according to the provisions of law governing such cases; and may, for the purpose of conveying him before such court or magistrate, detain him in custody for a period not exceeding twenty-four hours, or may, if he does not so require, or if there is no such court at or near the place, at once convey him on board.

"If such apprehension appears to the court or magistrate before whom the case is brought to have been made on improper or on insufficient grounds, the master, mate, consignee, or shipping commissioner who makes the same, or causes the same to be made, shall be liable to a penalty of not more than $100; but such penalty, if inflicted, shall be a bar to any action for false imprisonment."

The decision just made proceeds upon the broad ground that one who voluntarily engages to serve upon a private vessel in the capacity of a seaman for a given term but who, without the consent of the master, leaves the vessel when in port before the stipulated term is ended and refuses to return to it, may be arrested and held in custody until the vessel is ready to proceed on its voyage, and then delivered against his will, and if need be by actual force, on the vessel to the master.

The thirteenth amendment of the Constitution of the United States declares that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Slavery exists wherever the law recognizes a right of property in a human being; but slavery can not exist in any form within the United States. The thirteenth amendment uprooted slavery as it once existed in this country, and destroyed all of its badges and incidents. It established freedom for all. "By its own unaided force and effect it abolished slavery and established freedom." The amendment, this court has also said, "is not a mere prohibition of State laws establishing or upholding slavery or involuntary servitude, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States. (Civil Rights Cases, 109 U. S., 1, 20.)

As to involuntary servitude, it may exist in the United States; but it can only exist lawfully as a punishment for crime of which the party shall have been duly convicted. Such is the plain reading of the Constitution. A condition of enforced service, even for a limited period, in the private business of another, is a condition of involuntary servitude.

If it be said that government may make it a criminal offense, punishable by fine or imprisonment, or both, for anyone to violate his private contract voluntarily made, or to refuse, without sufficient reason, to perform it—a proposition which can not, I think, be sustained at this day, in this land of freedom—it would by no means follow that government could, by force applied in advance of due conviction of some crime, compel a freeman to render personal services in respect of the private business of another.

The placing of a person by force on a vessel about to sail is putting him in a condition of involuntary servitude, if the purpose is to compel him against his will to give his personal services in the private business in which that vessel is engaged. The personal liberty of individuals, it has been well said, "consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." (1 Bl., chapter 1, page 134.)

Can the decision of the court be sustained under the clause of the Constitution granting power to Congress to regulate commerce with foreign nations and among the several States? That power can not be exerted except with due regard to other provisions of the Constitution, particularly those embodying the fundamental guarantees of life, liberty, and property.

While Congress may enact regulations for the conduct of commerce with foreign nations and among the States, and may, perhaps, prescribe punishment for the violation of such regulations, it may not, in so doing, ignore other clauses of the Constitution. For instance, a regulation of commerce can not be sustained which, in disregard of the express injunctions of the Constitution, imposes a cruel and unusual punishment for its violation, or compels a person to testify in a criminal case against himself, or authorizes him to be put twice in jeopardy of life and limb, or denies to the accused the privilege of being confronted with the witnesses against him, or of being informed of the nature and cause of the accusation against him. And it is equally clear that no regulation of commerce established by Congress can stand if its necessary operation be either to establish slavery or to create a condition of involuntary servitude forbidden by the Constitution.

It is said that the statute in question is sanctioned by long usage among the nations of the earth, as well as by the above act of July 20, 1790.

In considering the antiquity of regulations that restrain the personal freedom of seamen, the court refers to the laws of the ancient Rhodians, which are supposed to have antedated the Christian era. But those laws, whatever they may have been, were enacted at a time when no account was taken of man as man, when human life and human liberty were regarded as of little value, and when the powers of government were employed to gratify the ambition and the pleasures of despotic rulers rather than promote the welfare of the people.

Attention has been called by the court to the laws enacted by the towns of the Hanseatic League four hundred years ago, by one of which a seaman who went ashore without leave could, in certain contingencies, be kept in prison "upon bread and water for one year," and by another of which an officer or seaman who quit his ship and concealed himself could be apprehended and "stigmatized in the face with the first letter of the name of the

town to which he belongs." Why the reference to these enactments of ancient times, enforced by or under governments possessing arbitrary power inconsistent with a state of freedom? Does anyone suppose that a regulation of commerce authorizing seamen who quit their ship without leave to be imprisoned "upon bread and water for one year," or which required them to be "stigmatized in the face" with the letter of the town or State to which they belonged, would now receive the sanction of any court in the United States?

Reference has also been made to an act of the colonial general court of Massachusetts, passed in 1647, declaring that a seaman who left his vessel before its voyage was ended might be "pursued as a runaway servant." But the act referred to was passed when slavery was tolerated in Massachusetts with the assent of the Government of Great Britain. It antedated the famous Declaration of Rights, promulgated in 1789, in which Massachusetts declared, among other things, that "all men were born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

The effect of that declaration was well illustrated in Parsons *vs.* Track (7 Gray, 473). That case involved the validity of a contract made in a foreign country in 1840 by an adult inhabitant thereof with a citizen of the United States "to serve him, his executors and assigns," for the term of five years, "during all of which term the said servant, her said master, his executors or assigns, faithfully shall serve, and that honestly and obediently, in all things as a good and dutiful servant ought to do." It was sought to enforce this contract in Massachusetts. After carefully examining the provisions of the contract, the court said:

"As to the nature, then, of the service to be performed, the place where and the person to whom it is to be rendered, and the compensation to be paid, the contract is uncertain and indefinite; indefinite and uncertain, not from any infirmity in the language of the parties, but in its substance and intent. It is, in substance and effect, a contract for servitude, with no limitation but that of time, leaving the master to determine what the service should be and the place where and the person to whom it should be rendered. Such a contract, it is scarcely necessary to say, is against the policy of our institutions and laws. If such a sale of service could be lawfully made for five years, it might, from the same reasons, for ten, and so for the term of one's life.

"The door would thus be opened for a species of servitude inconsistent with the first and fundamental article of our declaration of rights, which, proprio vigore, not only abolished every vestige of slavery then existing in the Commonwealth, but rendered every form of it thereafter legally impossible. That article has always been regarded not simply as the declaration of an abstract principle, but as having the active force and conclusive authority of law." Observing that one who voluntarily subjected himself to the laws of the State must find in them the rule of restraint as well as the rule of action, the court proceeded: "Under this contract the plaintiff had no claim for the labor of the servant for the term of five years, or for any term whatever. She was under no legal obligation to remain in his service. There was no time during which her service was due to the plaintiff, and during which she was kept from such service by the acts of the defendants."

It may be here remarked that the shipping articles signed by the appellants left the term of their service uncertain and placed no restriction whatever upon the route of the vessel after it left Valparaiso, except that it should ultimately return to some port within the United States.

Nor, I submit, is any light thrown upon the present question by the history of legislation in Great Britain about seamen. The powers of the British Parliament furnish no test for the powers that may be exercised by the Congress of the United States. Referring to the difficulties confronting the Convention of 1787, which framed the present Constitution of the United States, and to the profound differences between the instrument framed by it and what is called the British Constitution, Mr. Bryce, an English writer of high authority, says in his admirable work on the American Commonwealth:

"The British Parliament has always been, was then, and remains now a sovereign and constituent assembly. It can make and unmake any and every law, change the form of government or the succession to the crown, interfere with the course of justice, extinguish the most sacred private rights of the citizen. Between it and the people at large there is no legal distinction, because the whole plenitude of the people's rights and powers reside in it, just as if the whole nation were present within the chamber it sits. In point of legal theory it is the nation, being the historical successor of the Folk Moot of our Teutonic forefathers. Both practically and legally it is to-day the

only and the efficient depository of the authority of the nation; and is, therefore, within the sphere of law, irresponsible and omnipotent." (Volume 1, page 32.)

No such powers have been given to or can be exercised by any legislative body organized under the American system. Absolute, arbitrary power exists nowhere in this free land. The authority for the exercise of power by the Congress of the United States must be found in the Constitution. Whatever it does in excess of the powers granted to it, or in violation of the injunctions of the supreme law of the land, is a nullity, and may be so treated by every person. It would seem, therefore, evident that no aid in the present discussion can be derived from the legislation of Great Britain touching the rights, duties, and responsibilities of seamen employed on British vessels. If the Parliament of Great Britain, Her Britannic Majesty assenting, should establish slavery or involuntary servitude in England, the courts there would not question its authority to do so, and would have no alternative except to sustain legislation of that character.

A very short act of Parliament would suffice to destroy all the guaranties of life, liberty, and property now enjoyed by Englishmen. "What," Mr. Bryce says, "are called in England constitutional statutes, such as Magna Charta, the Bill of Rights, the act of settlement, the acts of union with Scotland and Ireland, are merely ordinary laws, which could be repealed by Parliament at any moment in exactly the same way as it can repeal a highway act or lower the duty on tobacco. Parliament," he further says, "can abolish when it pleases any institution of the country, the Crown, the House of Lords, the Established Church, the House of Commons, Parliament itself." (Volume 1, page 237.)

In this country the will of the people as expressed in the fundamental law must be the will of courts and legislatures. No court is bound to enforce, nor is anyone legally bound to obey, an act of Congress inconsistent with the Constitution. If the thirteenth amendment forbids such legislation in reference to seamen as is now under consideration, that is an end of the matter, and it is of no consequence whatever that government in other countries may by the application of force, or by the infliction of fines and imprisonment, compel seamen to continue in the personal service of those whom they may have agreed to serve in private business.

Is the existing statute to be sustained because its essential provisions were embodied in the act of 1790? I think not, and for the reason, if there were no other, that the thirteenth amendment imposes restrictions upon the powers of Congress that did not exist when that act was passed. The supreme law of the land now declares that involuntary servitude, except as a punishment for crime of which the party shall have been duly convicted, shall not exist anywhere within the United States.

The only exceptions to the general principles I have referred to, so far as they relate to private business, arise out of statutes respecting apprentices of tender years. But statutes relating to that class rest largely upon the idea that a minor is incapable of having an absolute will of his own before reaching majority. The infant apprentice, having no will in the matter, is to be cared for and protected in such way as, in the judgment of the State, will best subserve the interests both of himself and of the public. An apprentice serving his master pursuant to terms permitted by the law can not, in any proper sense, be said to be in a condition of involuntary servitude. Upon arriving at his majority, the infant apprentice may repudiate the contract of apprenticeship, if it extends beyond that period. (1 Parsons on Contr., 50.)

The word "involuntary" refers, primarily, to persons entitled, by virtue of their age, to act upon their independent judgment when disposing of their time and labor. Will anyone say that a person who has reached his majority and who had voluntarily agreed for a valuable consideration to serve another as an apprentice for an indefinite period, or even for a given number of years, can be compelled, against his will, to remain in the service of the master?

It is said that the grounds upon which the legislation in question rests are the same as those existing in the cases of soldiers and sailors. Not so. The Army and Navy of the United States are engaged in the performance of public, not private, duties. Service in the army or navy of one's country according to the terms of enlistment never implies slavery or involuntary servitude, even where the soldier or sailor is required against his will to respect the terms upon which he voluntarily engaged to serve the public. Involuntary service rendered for the public, pursuant as well to the requirements of a statute as to a previous voluntary engagement, is not, in any legal sense, either slavery or involuntary servitude.

The further suggestion is made that seamen have always been treated by legislation in this country and in England as if they needed the protection of the law in the same sense that minors and wards need the protection of parents and guardians, and hence have been often described as "wards of admi-

ralty." Some writers say that seamen are in need of the protection of the courts, "because peculiarly exposed to the wiles of sharpers and unable to take care of themselves." (1 Parson's Shipp. and Adm., 32.)

Mr. Justice Story, in Harden *vs.* Gordon (2 Mason, 541, 555), said that "every court should watch with jealousy any encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying and are easily overreached."

Mr. Justice Thompson (in The brig *Cadmus vs.* Matthews, 2 Paine, 229, 240) said:

"In considering the obligations of seamen arising out of their contract in shipping articles, according to the formula in common use, due weight ought to be given to the character and situation of this class of men. Generally ignorant and improvident, and probably very often signing the shipping articles without knowing what they contain, it is the duty of the court to watch over and protect their rights and apply very liberal and equitable considerations to the enforcement of their contracts."

In view of these principles I am unable to understand how the necessity for the protection of seamen against those who take advantage of them can be made the basis of legislation compelling them, against their will, and by force, to render personal service for others engaged in private business. Their supposed helpless condition is thus made the excuse for imposing upon them burdens that could not be imposed upon other classes without depriving them of rights that inhere in personal freedom. The Constitution furnishes no authority for any such distinction between classes of persons in this country.

If prior to the adoption of the thirteenth amendment the arrest of a seaman and his forcible return under any circumstances to the vessel on which he had engaged to serve could have been authorized by an act of Congress, such deprivation of the liberty of a freeman can not be justified under the Constitution as it now is. To give any other construction to the Constitution is to say that it is not made for all, and that all men in this land are not free and equal before the law, but that one class may be so far subjected to involuntary servitude as to be compelled by force to render personal services in a purely private business with which the public has no concern whatever.

The court holds that within the meaning of the Constitution the word "involuntary" does not attach to the word "servitude" continuously and make illegal a service which was voluntary at the outset, but became involuntary before the agreed term of service was ended. Consequently, "an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract, not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed involuntary. Thus," the court proceeds, "if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might be void upon grounds of public policy, but the servitude could not be properly termed involuntary.

"Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 17, 1823 (4 George IV, chapter 34), it was enacted that if any servant in husbandry, or any artificer, calico printer, handcraftsman, miner, collier, keelman, pitman, glassman, potter, laborer, or other person should contract to serve another for a definite time, and should desert such service during the term of the contract, he was made liable to a criminal punishment. The breach of a contract for a personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and apprentices, and possibly some others, nor would public opinion tolerate a statute to that effect."

It seems to me that these observations rest upon an erroneous view of the constitutional inhibition upon involuntary servitude.

Of the meaning and scope of the constitutional interdict upon slavery no one can entertain doubt. A contract by which one person agrees to become the slave of another would not be respected in any court, nor could it become the foundation of any claim or right, even if it were entered into without constraint being used upon the person who assumed to surrender his liberty and to become the property of another. But involuntary servitude, no matter when it arises, if it be not the result of punishment for crime of which the party has been duly convicted, is as much forbidden by the Constitution as is slavery. If that condition exists at the time the authority of the law is invoked to protect one against being forcibly compelled to render personal services for another, the court can not refuse to act because the party seeking relief had voluntarily agreed to render such services during a given period.

The voluntary contracts of individuals for personal services in private business can not justify the existence anywhere or at any time in this country of a condition of involuntary servitude not imposed as a punishment for crime, any more than contracts creating the relation of master and slave can justify the existence and recognition of a state of slavery anywhere, or with respect to any persons, within the jurisdiction of the United States. The condition of one who contracts to render personal services in connection with the private business of another becomes a condition of involuntary servitude from the moment he is compelled against his will to continue in such service. He may be liable in damages for the nonperformance of his agreement, but to require him, against his will, to continue in the personal service of his master is to place him and keep him in a condition of involuntary servitude.

It will not do to say that by "immemorial usage" seamen could be held in a condition of involuntary servitude, without having been convicted of crime. The people of the United States, by an amendment of their fundamental law, have solemnly decreed that "except as a punishment for crime, whereof the party shall have been duly convicted," involuntary servitude shall not exist in any form in this country. The adding another exception by interpretation simply and without amending the Constitution is, I submit, judicial legislation. It is a very serious matter when a judicial tribunal, by the construction of an act of Congress, defeats the expressed will of the legislative branch of the Government. It is a still more serious matter when the clear reading of a constitutional provision relating to the liberty of man is departed from in deference to what is called usage which has existed, for the most part, under monarchical and despotic governments.

In considering this case it is our duty to look at the consequences of any decision that may be rendered. We can not avoid this duty by saying that it will be time enough to consider supposed cases when they arise. When such supposed cases do arise, those who seek judicial support for extraordinary remedies that encroach upon the liberty of freemen will of course refer to the principles announced in previous adjudications, and demand their application to the particular case in hand.

It is, therefore, entirely appropriate to inquire as to the necessary results of the sanction given by this court to the statute here in question. If Congress, under its power to regulate commerce with foreign nations and among the several States, can authorize the arrest of a seaman who engaged to serve upon a private vessel and compel him by force to return to the vessel and remain during the term for which he engaged, a similar rule may be prescribed as to employees upon railroads and steamboats engaged in commerce among the States. Even if it were conceded—a concession to be made only for argument's sake—that it could be made a criminal offense, punishable by fine or imprisonment or both, for such employees to quit their employment before the expiration of the term for which they agreed to serve, it would not follow that they could be compelled, against their will and in advance of trial and conviction, to continue in such service. But the decision to-day logically leads to the conclusion that such a power exists in Congress.

Again, as the legislatures of the States have all legislative power not prohibited to them, while Congress can only exercise certain enumerated powers for accomplishing specified objects, why may not the States, under the principles this day announced, compel all employees of railroads engaged in domestic commerce, and all domestic servants, and all employees in private establishments, within their respective limits, to remain with their employers during the terms for which they were severally engaged, under the penalty of being arrested by some sheriff or constable, and forcibly returned to the service of their employers? The mere statement of these matters is sufficient to indicate the scope of the decision this day rendered.

It seems to me that the thirteenth amendment, although tolerating involuntary servitude only when imposed as a punishment for crime of which the party shall have been duly convicted, has been construed, by the decision just rendered, as if it contained an additional clause expressly excepting from its operation seamen who engage to serve on private vessels. Under this view of the Constitution we may look for advertisements, not for runaway servants, as in the days of slavery, but for runaway seamen. In former days overseers could stand with whip in hand over slaves and force them to perform personal service for their masters. While, with the assent of all, that condition of things has ceased to exist, we can but be reminded of the past when it is adjudged to be consistent with the law of the land for freemen who happen to be seamen to be held in custody that they may be forced to go aboard private vessels and render personal services against their will.

In my judgment the holding of any person in custody, whether in jail or by an officer of the law, against his will, for the purpose of compelling him to render personal service to another in a private business, places the person so held in custody in a condition of involuntary servitude forbidden by the

Constitution of the United States; consequently, that the statute as it now is, and under which the appellants were arrested at Astoria and placed against their will on the barkentine *Arago*, is null and void, and their refusal to work on such vessel after being forcibly returned to it could not be made a public offense authorizing their subsequent arrest at San Francisco.

I dissent from the opinion and judgment of the court.

The following is the full text of the petition for rehearing presented to the court by Mr. Ralston and myself in the above case:

PETITION FOR REHEARING AND RECALL OF MANDATE.

The appellants in the above-entitled cause respectfully petition the court for a rehearing thereof, and for a recall of the mandate issued upon the judgment and decision of the court therein, and in support of their petition respectfully represent to the court as follows:

I.

That the decision of the court affirming the judgment of the district court for the northern district of California was rendered and based principally upon a construction of the thirteenth amendment to the Constitution of the United States, and particularly upon a definition of the term "involuntary servitude," as used in said amendment, although neither the construction of said thirteenth amendment nor the meaning or definition of the term "involuntary servitude," as used therein, was discussed or argued by the attorneys or counsel for either appellants or respondents in this court or in the court below, the question discussed in this behalf being: Whether or not the necessities of the case of the seaman excluded him from the protection of that amendment.

II.

That the construction given to the thirteenth amendment to the Constitution of the United States, and particularly to the term "involuntary servitude," as used therein, in the decision rendered by the court, is of great importance to the people of the United States generally, and very materially affects the liberties and rights not only of these appellants but also of great numbers of such citizens other than appellants; and appellants are advised by their counsel, and verily believe, that, upon a rehearing and full argument upon the specific questions involved in the construction of said thirteenth amendment, and particularly of the term "involuntary servitude," as used therein, a very strong showing and argument can be made in support of a construction more favorable to liberty and to the rights of these appellants, and strongly tending to support and sustain their appeal herein from the judgment of the district court of the northern district of California.

III.

That the decision of the court in this case should be reheard, upon more full argument by counsel, upon the questions involved therein, particularly the question of the construction and meaning of the said thirteenth amendment to the Constitution of the United States and of the term "involuntary servitude" as used therein; because the effect of the decision as rendered is to reestablish a condition of legal servitude among citizens of the United States, which it was the intention of the people of the United States to prohibit and make unlawful by the adoption of said thirteenth amendment, and entirely defeats and renders of no effect the term "involuntary servitude," which was added to the term "slavery" in said amendment for the express purpose of making it impossible to establish in this country a condition of contractual slavery, differing from chattel slavery only in the fact that it is presumably voluntary at its inception, because evidenced by a contract signed by the party held to service.

In this behalf your petitioners submit that if the term "involuntary servitude," as used in said thirteenth amendment, does not prohibit or prevent the enforcement of personal servitude against the will of the party held to service, in cases where such service was at its inception voluntarily undertaken, then said thirteenth amendment affords no further protection or guaranty of liberty by reason of the use of the term "involuntary servitude" therein than would have been secured and guaranteed had said term been omitted from said section, because a servitude enforced upon a person without his contract is slavery, and all such cases of servitude are included in the term "slavery;" whereas a servitude voluntary at its inception becomes involuntary whenever the person held to service is no longer willing to be bound to such service. In this behalf petitioners further submit that as the construction given to said thirteenth amendment by the court, in its decision in this case, can not be free from doubt; that every doubt concerning the true interpretation of a statute should, under the universal rule of English,

as well as of American jurisprudence, be resolved most favorably to the liberty of the citizen, whereas, in its decision in this case, the court has apparently resolved the doubt against the liberty of the citizen.

IV.

If the construction given by the court to the said thirteenth amendment be adhered to, there is great danger that designing persons, not sufficiently regarding the sacred right of their fellow citizens to liberty and the pursuit of happiness, may take advantage of their pecuniary distresses and difficulties to reduce them to a condition of slavery under the form of contracts to labor, and in this behalf it is matter of common knowledge that thousands of impoverished citizens, at all times, and millions of citizens in periods of industrial depression, being landless, and therefore without means of independent self-support, can be readily induced by reason of their helplessness and the overwhelming pressure of their inability otherwise to procure the common necessaries of life, to sign away their liberties, either for life or for fixed terms, precisely as these appellants, under pressure of that very privation, were obliged to enter into the contract for servitude, the rigors and unendurable hardships of which they sought to escape by fleeing from the immediate control of their masters to the soil of the free State of Oregon.

Indeed, it is alarming to contemplate the extent to which contractual slavery may be forced upon the landless laborers of this country, white as well as black, by a mere concert of action, prompted by the plainest inducements of self-interest, on the part of employers, to exclude such landless, and therefore helpless and dependent laborers, from employment until they shall be compelled by their privations to sign such contracts for personal servitude as will bind them for life or for long terms to the control and dominion of individual masters.

V.

That the questions determined by the decision of the court on this appeal, and particularly the construction given to the said thirteenth amendment and to the term "involuntary servitude" as used therein, should be again heard and considered upon a more full and complete argument of the specific questions of the meaning of said amendment and of the said term "involuntary servitude" used therein, because the decision as rendered revives and restores all of the odious conditions and practices established by subdivision 3 of section 2 of Article IV of the Constitution of the United States, and supported, upheld, and enforced by the fugitive slave law and by the decisions of the United States Supreme Court in the cases of Dred Scott *vs.* Sanford, 19 Howard, 393; Ableman *vs.* Booth, and Booth *vs.* United States, 21 Howard, 506; Moore *vs.* The People of Illinois, 14 Howard, 13; Strader *vs.* Graham, 10 Howard 82; Jones *vs.* Vansant, 5 Howard, 215; and Prigg *vs.* The Commonwealth of Pennsylvania, 16 Peters, 539; all of which were for more than thirty years believed by the people of the United States to have been overturned and made of no further effect by the adoption of the said thirteenth amendment to the Constitution of the United States.

The only difference between the rule in the cases above cited and the rule laid down in this case being that slavery, i. e., servitude not voluntary at its inception, can not be enforced.

Analogy to fugitive-slave laws.

Subdivision 3, of section 2, Article IV, of the Constitution of the United States reads as follows:

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

The fugitive-slave law merely provided for carrying that provision of the Constitution of the United States into effect. The cases cited, including the Dred Scott case, merely upheld the plain meaning of that provision of the Constitution, and held the laws passed for the purpose of giving it effect to be constitutional, and also held, particularly in the case of Prigg *vs.* The Commonwealth of Pennsylvania, 16 Peters, 539, that the enforcement of the rights of masters to "persons held to service or labor in one State under the laws thereof, escaping to another" might be devolved by Federal laws upon judges, justices, and other officers of the State in which such escaping person might be found.

These appellants, in the case under consideration, were persons held to service and labor under contracts made in the State of California, escaping from the immediate custody of their masters into the State of Oregon, and they were seized in the State of Oregon under the authority of Federal laws by State officers, adjudged to be bound to personal service to individual masters under their contracts, notwithstanding that they were unwilling to be held to such service, and that they would not voluntarily continue in such service, and that they could be compelled to continue in such service only by

the coercion of their several wills and by force sufficient to overcome their volition, and they were so delivered up by the officers of the State of Oregon on claim of the party to whom their service and labor were nominally due under the terms of the contract. The Dred Scott case, which it was certainly the fixed purpose and intention of the people of the United States to overrule and nullify by the adoption of the thirteenth amendment to the Constitution of the United States, went no further than the decision in this case goes, save and except that in the Dred Scott decision it was held that such holding to service or labor might be originally imposed upon the party held thereto without his assent at the inception thereof.

The great popular agitation against slavery, which led to the determination on the part of the people that it must be abolished in the United States, and the efforts for the abolition of which led to the war of the rebellion, was an opposition to permitting in this country any private citizen to compel another citizen to serve him contrary to the will of the party held to service, no matter how the servitude originated. It was not merely an opposition to the chattel slavery of the negro, but to every form of slavery and involuntary servitude imposed either upon the black man or upon the white man, by which one might be compelled against his present will to render personal service to another, or to be pursued by another from State to State and seized and delivered up to a master upon the claim that personal service wase due to such master. The people in adopting the thirteenth amendment certainly did not have in mind any limitations upon the term "involuntary servitude," but understood it according to its generally accepted meaning as any servitude enforced by one man upon another against the present will of the latter.

It must be apparent, too, that if the said thirteenth amendment does not prohibit the enforcement of contracts for personal service against the will of the party held to such service, existing social and industrial conditions must in time make such contracts as universal if not more universal than chattel slavery was before the war of the rebellion, giving rise to vested interests under such contracts far beyond the interests that were vested in chattel slavery, for the helpless condition of the servient class will enable employers to procure contracts for service that will be very valuable to them in the same proportion in which they are oppressive to the people bound by them.

It is certain that the people of this country will not be more tolerant to that kind of contractual slavery than they were to the chattel slavery of the South, and the question must finally, and perhaps speedily, arise as to whether the people of the United States shall be taxed to pay for the freedom of citizens bound to servitude under such contracts or whether legislation shall be enacted to destroy all vested rights in human flesh and blood without compensation, as was done in the case of chattel slavery. In view of the evident and serious possibilities thus involved to our country and to our people generally, in common with appellants, in the determination of the meaning and scope of the said thirteenth amendment, we submit that a rehearing should be granted, and a more full and complete argument of this specific question be heard and considered by the court before making the final limitation upon the scope and meaning of said thirteenth amendment involved in the decision rendered in this case.

VI.

Your petitioners respectfully submit that the construction given to the said thirteenth amendment, and particularly to the term "involuntary servitude" as used therein, is erroneous.

What is involuntary servitude?

The language of the thirteenth amendment is:

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

We submit that the term "involuntary servitude," as used in that amendment, can have but one meaning, viz, a servitude enforced against the present will of the servant. To nullify or limit that meaning in any way necessarily deprives the term of any effect or purpose whatever, as used in the amendment.

The qualifying adjective "involuntary" necessarily attaches to the word servitude, as used in that amendment, continuously, except in the single case excluded by the terms of the amendment itself from its operation, viz, where the servitude is imposed as a punishment for crime, after due conviction.

It seems to us that the fundamental mistake in the prevailing opinion of the court is the assumption that the thirteenth amendment was intended to be, or is, a limitation upon the powers of the Government, or upon the relations of the Government to its citizens, as well as a limitation upon the relations that may exist between private citizens.

The thirteenth amendment has no application whatever to the relation that may exist between the Government and its citizens, but is an inhibition of slavery and involuntary servitude as between citizens, absolutely prohibiting any citizen or any person in the United States from holding another either to slavery or to involuntary servitude, and in its application it is not restricted to any classes of citizens nor to any occupations or industries, but includes all citizens and all employments in which men may be held to service, under contract or otherwise. To hold that the term "involuntary servitude" does not apply to servitude originating in a contract, voluntarily made, is to destroy the whole meaning and purpose of the term as used in the amendment, because servitude, involuntary at its inception, is slavery. Slavery is a servitude imposed upon a man against his will. If, then, no servitude is to be regarded as involuntary under the terms of the amendment, except such as was involuntary at its inception, the term "involuntary servitude" in the amendment is superfluous, because the term "slavery" covers all such cases.

The exception to the inhibition of involuntary servitude in the proviso that such servitude may be enforced as a punishment for crime, after conviction, does not suggest that the amendment was intended in any way to limit the rights of Government in its relations to its citizens. That exception does not relate to the imprisonment of citizens convicted of crime, nor to the right of the Government to compel persons convicted of crime to perform hard labor during such imprisonment, but was intended to except from the otherwise unqualified limitation upon the right of any person to hold another to involuntary servitude, cases in which, under the laws of several of the States, persons convicted of crime and sentenced to imprisonment at hard labor may be compelled to perform such labor for private citizens contracting with the State for the service of such prisoners. It was intended solely to exempt from the general terms of the amendment the farming out of convict labor to private contractors.

As the amendment is a limitation upon the relations of private citizens only, and not in any sense a limitation upon the relations of the Government to its citizens, the argument that the construction of the term "involuntary servitude," for which we contend, would entitle a soldier to desert his regiment on the eve of battle has no foundation, because the amendment does not, and does not purport to, affect the relations between the Government and its citizens, whether they be soldiers or not. The thirteenth amendment, then, being a limitation upon private rights and private powers merely, the construction of the term "involuntary servitude" is relieved of the embarrassing consequences that would result to the Government of the United States or to the government of any of the States, by depriving such Government of the power to compel the service of its enlisted soldiers or sailors, or, in cases of extreme danger, to compel the service of all its citizens.

Arguments from inconvenience and necessity.

The argument in favor of the position that servitude under a contract voluntarily made can never become legally involuntary under the terms of the thirteenth amendment is that a contrary construction would be destructive of the merchant marine service, because in that service it is necessary that sailors be bound to serve upon the ships to which they are articled, for the voyage or other term for which they contract, and that in this respect the merchant marine service is and ever has been essentially different from all other private employments.

We can not concede that even the truth of that assumption would justify or permit a construction denying the protection to American sailors that is guaranteed to all citizens by any provision of the Constitution. But the assumption is without foundation.

Whatever may have been the condition with respect to the manning of vessels in foreign ports in earlier periods, when the citizens of one nation would not or could not accept service in the merchant marine of another, it would be idle here to discuss. The truth is that at the present time no such necessity exists, because seamen of all nations serve indiscriminately in the merchant vessels of all nations. In this respect the sailor is to-day a citizen of the world.

Whatever may be his nationality or the nation to which he owes allegiance in the strict sense of citizenship, under the laws of all maritime nations the seaman is entitled to the protection of the flag under which he sails, regardless of his citizenship. It is, therefore, quite immaterial to him to what nationality the ship in which he sails may belong, or in what vessels he may ship in the ports of foreign nations. The only important questions with him are the seaworthiness of the ship and the character of the master.

An American vessel can secure a crew in Liverpool, or Antwerp, or Genoa, or Singapore, or Yokohama as readily as can the ships of any of the nations in which these ports are situated, and as readily as in the port of New York.

In fact, the practice of shipowners and masters of the American merchant marine for the last thirty years and over has been not to continue their crews in employment or service while in foreign ports awaiting cargoes. The uniform practice has been to discharge or otherwise get rid of their crews in such foreign ports to save the expense and annoyance of keeping them on or about the ship while lying, for the ordinary periods of detention, for freight in foreign ports. In recognition of this universal practice, carried out unlawfully before that time, Congress, in 1884, passed an act authorizing masters and sailors by agreement to cancel the sailing contracts or articles.

Before that time sailors deserted the vessels in foreign ports, generally under compulsion of treatment intended to induce or compel them to desert, and since the passage of the act, in nearly all cases, the crews of American vessels have been discharged by agreement between the masters and the sailors, under the terms of the act, in the foreign ports. The facility with which American vessels can secure crews in foreign ports makes it not only unnecessary but unbusinesslike to retain the crews while lying for considerable periods in foreign ports. This change of conditions in the merchant marine service of the various countries, and this uniform practice, contrary to the law, led to the passage of the laws now securing the rights of sailors and of masters and owners in the cancellation of sailing articles.

The other example of hardship and injustice cited in the prevailing opinion, in support of the position that the inhibition of involuntary servitude can not apply to service in the merchant marine, under articles, is the case of the sailor deserting his ship between ports, or even in a storm at sea. That is an extreme case, in which the lives of other men or the property of others, or both, would be jeopardized or destroyed as an immediate consequence of the sailor's refusal to perform his part in the common hazard and purpose undertaken by him with the others, on the faith of which other men and the property of other men went into the danger. We contend that he is not, even in that extreme case, bound to continued servitude under his contract, but he is bound not to desert other men in a danger into which he has led them, or into which he and they have gone, mutually relying upon each other. He must remain with them until the danger has passed, until they are in a position of safety; then, and not until then, does the question of his servitude under his contract arise, and then, if he is not willing further to serve under his contract, he can not and should not be compelled so to do involuntarily.

The case cited by the court is analogous to the case of two men engaged in digging a well, and after sinking to a considerable depth the man at the windlass decides that the work is beyond his strength or hopelessly unprofitable, and determines that he will not further pursue it. He has a perfect right to notify his colaborer that he will not proceed further with the sinking of the well, and he has a right to terminate his obligation to his employer in that behalf, but if his fellow-laborer is at the bottom of the well and the determination not to work further under the contract comes upon him while he is hoisting a bucket of earth, he can not let go of the windlass and allow the bucket of earth to fall on his colaborer.

He is bound to either hoist the bucket of earth to the surface or to lower it safely to the bottom of the well, not because his contract can not be terminated when the bucket is half way up in the well, but because to let go of the windlass at that moment would cause the death or severe injury of his colaborer through his willful wrong, and he would in that case be held criminally and civilly liable, not under his contract with his employer for service, but because of his wrongful act against his colaborer. Neither would he have a right, after hoisting the bucket of earth from the well, to go away and leave his colaborer at the bottom of the well. He is bound not by his contract for service, but by his duty to his colaborer, who has taken the risk of the employment and placed himself at the bottom of the well upon the faith that the man at the windlass would not inflict injury upon him, nor abandon him while in danger, but would restore him to a position of safety before actually abandoning his work.

Upon this he has a right to rely independently of the contract of his colaborer and although he be not a party to such contract.

So a teacher of the art of swimming may at any time determine that he will not further teach his pupil, but if he reaches the determination while he has his helpless pupil in deep water, he is bound to take him back to a place of safety, not because he is bound by his contract to work further for his pupil, but because of his duty, regardless of his contract, not to leave a fellow-being to perish in a position of danger into which he had led him and from which he could have extricated him safely.

But, assuming that the merchant-marine service would be impaired or crippled by enforcing the terms of the Constitution, as the sovereign people, through their regularly constituted State legislatures, have written it, this hardship or inconvenience can be corrected only by an amendment to the Constitution regularly adopted.

The courts have no jurisdiction to change a letter nor to modify a term of this supreme law of the land in order to meet any condition of inconvenience or necessity which, to them, may seem likely to result from its enforcement. The prevailing opinion in this case seems to rest the decision of the court upon considerations of necessity and expediency, against the letter of the Constitution. Indeed, the very appeal to the arguments of hardship and necessity is an admission that, but for those arguments, a contrary construction must be given to the constitutional provision in question. Clearly any consideration of hardship or necessity would be irrelevant and immaterial to an interpretation of the provision in question if, independently of that consideration, the true interpretation of the provision would avoid the hardship or meet the necessity.

The provisions of the thirteenth amendment in question are favorable to the rights of man, and particularly to the individual liberty of all American citizens, regardless of classes and of occupations, while the modification of the meaning and effect of the amendment involved in the decision of the court in this case is to break down those safeguards of human liberty upon the ground that their maintenance and enforcement would interfere with the success of the American merchant marine.

We submit that the people, and not the courts, must deal with that question, and that the courts must in all cases enfore the Constitution as it is written, without regard to consequences.

Where the meaning of any provision of the Constitution is ambiguous, or otherwise uncertain, the courts must resolve doubts thus arising out of the language of the provision, and in such cases all doubts arising must be resolved in favor of human liberty. Doubts as to the meaning of a constitutional provision can never, properly, arise out of the consideration of extraneous facts or assumptions of fact.

In consideration of the foregoing propositions of law and fact which we feel can be fully supported and established on a rehearing, your petitioners respectfully pray that a rehearing be granted, and that the mandate heretofore issued to the United States district court of the northern district of California be recalled.

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8375